

IN THE MATTER OF the Human Rights Code R.S.O. 1990, C. H-19; as amended

AND IN THE MATTER OF the complaint dated September 10, 1990, by Douglas Wellington alleging discrimination in employment on the basis of handicap by the Corporation of the City of Brampton Community Services Dept., Verral Clark, Deputy Fire Chief of Community Services

BETWEEN:

DOUGLAS WELLINGTON
(Complainant)

-and-

CORPORATION OF THE CITY
OF BRAMPTON COMMUNITY
SERVICES DEPARTMENT AND
VERRAL CLARK
(Respondents)

B E F O R E :

M.R. GORSKY

Chairperson

A P P E A R A N C E S :

For the Respondents - M. Hines
Counsel

For the Commission - Fiona Campbell
Counsel

The Complainant appeared in person

HELD AT: Brampton, Ontario

DATE: May 25, 1993 (Conference call)
Jan. 10, 11, 12, 1994
Jan. 17, 18, 19, 20, 21, 1994
Jan. 26, 27, 28, 1994
May 12, 13, 1994
Jun. 7, 1994
Jul. 20, 21, 1994
Aug. 12, 1994
Sep. 29, 1994 (Conference call)

D E C I S I O N

The Complainant, Douglas Wellington, filed a Complaint under the provisions of the Human Rights Code, 1981 (the "Code") on September 28, 1990, against the Corporation of the City of Brampton Community Services Department, Verral Clark, Deputy Fire Chief and Donald M. Gordon, Commissioner of Community Services. The complaint was marked as Exhibit 1 Tab 1.

At the opening of the case, Ms. Campbell, counsel for the Commission, informed me that she had been instructed to withdraw the complaint against the personal Respondent, Donald M. Gordon, and I indicated that this would be recorded in the decision.

In paras. 13 and 14 of the complaint, the following paragraphs appear:

13. I am a person who had worked for the respondents for more than twelve (12) years. I had sustained an injury on the job as a First Class Firefighter, and since that time, I have been unable to return to firefighting and therefore receive no income increases. I recently applied for a new position as a Fire Prevention Officer, but my employer had denied me the position as a result of my health and physical condition.
14. I am a person who suffered a back injury at work and has brain tumours and I believe that my right to equal treatment with respect to employment without discrimination because of handicap has been infringed by the above cited respondents, contrary to Section 4(1) & 3 of the Human rights Code, 1981, Statutes of Ontario, 1981, Chapter 53 as amended.

In her opening statement, Ms. Campbell indicated that in support of the position in the Complaint alleging discrimination in employment on the basis of handicap she would be dealing with two issues that she regarded as before me in this case. The issues referred to are set out at p. 9 of Volume 1 of the Transcript:

First, has the Respondent discharged its onus to accommodate Mr. Wellington's needs arising from his handicaps, short of undue hardship; and second, were Mr. Wellington's handicaps a factor in the Respondent's refusal to give him the position of Fire Prevention Officer in a competition in February 1990.

Ms. Campbell elaborated upon the Commission's position, at p. 13 of Volume 1 of the Transcript:

First and foremost the Respondents have failed to discharge their onus to accommodate Mr. Wellington in a position that he was physically and psychologically capable of doing. Second, one of the factors in Mr. Wellington being denied the position of Fire Prevention Officer in the 1990 competition was his handicaps.

In dealing with the issue of accommodation, Ms. Campbell stated further, at p. 13, Volume 1 of the Transcript:

The Commission will further argue that the Respondents have maintained a policy of accommodating injured firefighters in positions which they were capable of doing. It will be the Commission's position that the Respondents failed to follow this policy with Mr. Wellington because of the psychiatric aspect of his disability.

The remedy sought by the Commission is set out at pp. 13-14 of Volume 1 of the Transcript:

... reinstatement of Mr. Wellington to the Brampton Fire department in the position of Fire Prevention Officer and back wages and benefits from March 1990. In the alternative, it will be the Commission's position that Mr. Wellington should be placed in an alternate position

in the Brampton Fire Department, at a level similar to his former position, in which he is physically and psychologically capable of performing.

When pressed to clarify the nature of the accommodation which it was alleged had not been made by the Employer, Ms. Campbell stated, at p. 17 of Volume 1 of the Transcript:

As far as I am aware, there would have been no accommodation -- further accommodation necessary, because of the psychiatric nature of Mr. Wellington's disabilities, in the Fire Prevention position. ...

At p. 18 of Volume 1 of the Transcript, in dealing with her allegation that the Respondent, Corporation of the City of Brampton Community Services Department, had failed to discharge an onus to accommodate, Ms. Campbell clarified her position, as follows:

... I was talking about ... placing him in another position which he was capable of doing. Whether that was [the] Fire Prevention Officer position or another position in the department which he was capable of doing ...

In dealing with the Fire Prevention Officer position referred to in the above quoted portions of the Complaint, Mr. Hines stated, at p. 19, Volume 1 of the Transcript:

... I do not think that it is our position that Mr. Wellington was physically or mentally incapable of performing the job, and consequently the issue of accommodation does not really arise in any significant fashion.

... Even assuming some accommodation was required, even if that accommodation had been offered, Mr. Wellington still would not have been the best candidate for the job.

In order to further define the issues between the parties, Mr. Hines stated, ibid.:

... Does the Commission take the position that Mr. Wellington was entitled to the job [of Fire Prevention Officer] even if he was not the best qualified, simply because he suffers from a handicap?

I took it from Ms. Campbell's comments that the Commission was not taking the position that Mr. Wellington was entitled to the Fire Prevention Officer job even if he was not the best qualified simply because he suffered from a handicap recognized under the Code. What she was saying, as elaborated upon in her statements found at pp. 19-20 of Volume 1 of the Transcript, was:

... There are different levels to the Commission's argument or different tiers to the Commission's argument.

One of the Commission's argument is that apart from the job competition there was also an independent duty to accommodate the Complainant in a position that he was capable of doing. So yes, taken apart from the job competition itself, there was an onus on the Respondent to place Mr. Wellington in a position that he is capable of doing.

Ms. Campbell further clarified her position at pp. 20-1 of Volume 1 of the Transcript:

From what I understand Mr. Hines' statement to be, I do not think I am taking issue with that as far as the job competition itself goes. I think that there will be an issue in the job competition as to whether or not Mr. Wellington and the successful candidate for the position were similarly or -- you know, the relative qualifications of the two candidates, that will be an issue. It will not be an accommodation issue so much in that actual competition part of the case.

Based on Ms. Campbell's elaboration on her position that there was an obligation on the part of the Employer to accommodate Mr.

Wellington's handicaps, what was referred to as a "free-standing duty out there to provide Mr. Wellington with a job that he can perform," Mr. Hines questioned whether such an issue was properly before me under the above noted Complaint.

At pp. 22-3 of Volume 1 of the Transcript, Mr. Hines stated:

... Now ...now we have heard, and it is a fact, that Mr. Wellington's employment was terminated some further two years down the road, and indeed there is another complaint on that aspect, but that is not before you, and I am just wondering if the duty to accommodate asserted by the Commission as it relates to this case, that general duty as it relates to this case, means that Mr. Wellington is entitled to the first job that he applies for that he is capable of doing, whether he is the best candidate or not? Or, the first job that he applies for, is qualified and decides he really wants?

I am just wondering, this free standing duty to accommodate absolutely is something that might be relevant to the termination issue, but as it relates to this individual competition, what are its implications?

I subsequently ruled that the first issue raised by Ms. Campbell concerning a general duty to accommodate an employee with a handicap recognized under the Code was not properly before me. It was not part of the complaint as filed, which I found to be restricted to an allegation arising out of the treatment of Mr. Wellington as a candidate for a position of Fire Prevention Officer in a competition held in March of 1990, where it was alleged that he had been denied that position "as a result of my health and physical condition." The other allegations contained in the Complaint, which involve various actions taken by the Employer that relate to the Complainant's handicaps, were relied upon as evidence

supporting the Commission's submissions that the Respondents had discriminated against Mr. Wellington because of his handicap in denying him the Fire Prevention Officer position. (See Transcript, Vol. 3, p.3.)

Mr. Wellington graduated from Bramalea Secondary School in 1975, after having completed Grade 12. He worked for the Royal Bank of Canada as a teller in 1976 for approximately a year, after which he became a head teller. After leaving the Royal Bank he worked for Inland Publishing in the mail order room for approximately a year with a view to apprenticing as a printer.

Mr. Wellington wished to emulate his father who had been a fire fighter during the Second World War, and, to achieve this end, applied for a position with the Employer about September of 1977.

Approximately a month after filing his application he received an interview. He described the entry test as being "a mechanical exam."

In addition, Mr. Wellington was required, along with other successful candidates, to complete a physical test which he said took place at "... the smoke house with our breathing apparatus on [where he had to] climb a hundred foot aerial ladder."

After passing all the tests and being accepted as a trainee, he commenced employment with the Brampton Fire Department on April 17, 1978. At that time he went into the Training Division with five other candidates for a period of six weeks (according to Mr. Wellington - actually 120 hours or three weeks). At this time he was instructed about the basics of firefighting, such as the use of breathing apparatus, theory of fire, first aid, a small amount of hydraulics, as well as training in ventilation and salvage. He described this training as readying him to go to a fire station, get on a truck and perform basic duty.

His first posting was to the headquarter station on Rutherford Road South in Brampton where he was stationed as a Fourth Class Firefighter.

Mr. Wellington was a Fourth Class Firefighter for approximately a year when he wrote another exam and performed a practical test. There was also an evaluation from the captain of the station. Upon successfully completing the program he was promoted to Third Class Firefighter.

Mr. Wellington testified that as a Third Class Firefighter he had to be familiar with the duties of the Fire Prevention Division. He referred to having to be aware of factors relevant to determining the cause of a fire. He also referred to training in fire detection.

After being a Third Class Firefighter for approximately a year he wrote exams, completed a practical exercise and received evaluation from station officers, and became a Second Class Firefighter. He followed the same process in becoming a First Class Firefighter in 1981. In addition to the Firefighting Division there were Fire Prevention, Training, Community Relations, Apparatus and Maintenance, and Communications Divisions.

Mr. Wellington testified that on the basis of a recommendation from his Captain, he was allowed to write the captain's exam in 1986. Although he received close to a passing grade, he did not pass the exam.

Prior to 1985, Mr. Wellington had no serious health problems, but referred to certain problems (colds and flues) which he regarded as not affecting his ability to do his job. He also referred to headaches and the development of a slight weakness on his right side. He recalled having headaches and weakness on his right side from approximately 1984 "going over to '85." (Transcript, Volume 1, p. 68)

Mr. Wellington started to experience severe headaches in 1985 and was conscious of a weakness on his right side. He also stated that his leg started "jerking sometimes at night to the point of total weakness." (Transcript, Volume 1, p. 79)

His family doctor, Dr. Diesch, arranged for a consultation with a neurologist, Dr. Marshall Zaitlen. Dr. Zaitlen arranged for Mr. Wellington to be admitted into the Peel Memorial Hospital for a number of tests including a CT scan. As a result of the CT scan Dr. Zaitlen determined that Mr. Wellington was suffering from a brain tumour, which he identified as a meningioma.

Dr. Zaitlen arranged for a consultation with Dr. Fred Gentili, a neurosurgeon at the Toronto General Hospital. Dr. Gentili recommended the surgical removal of the tumour, which surgery took place in the summer of 1985.

Following the surgery, Mr. Wellington recovered the strength on his right side and experienced no further symptoms of a "heavy feeling going down the right arm." (Transcript, Volume 1, p. 82)

Surgery determined that the tumour was partially malignant and Mr. Wellington went through a course of radiation therapy at the Princess Margaret Hospital in Toronto.

As a result of the brain tumour Mr. Wellington was off work from approximately June to December of 1985.

Mr. Wellington called the Brampton Fire Department office in December of 1985, pursuant to his understanding of the regulations requiring employees to communicate with the Department on a monthly

basis when they were off for health related reasons in order to furnish updates on their condition.

When he phoned the Department in December of 1985, the secretary to then Acting Chief Core, informed him that the Communications Division was short one person because a staff member was off on maternity leave.

Because he was near the end of his regular sick leave, Mr. Wellington volunteered to work in the Communications Division until he was physically able to return to the Fire Fighting Division. His request was approved by then Deputy Chief Core, and Mr. Wellington commenced work in the Communications Division in January of 1986, where he worked for approximately three months. His status at the time was that of a First Class Firefighter who, because of illness, was working as a Communications Operator.

Mr. Wellington's duties in Communications, at this time, involved mostly paperwork, which he described as keeping occupancy and running cards updated.

After completing the three month assignment in Communications, Mr. Wellington returned to the Fire Fighting Division as a First Class Firefighter and he regarded himself as having experienced a full recovery from his health problems. His return to full time work as a First Class Firefighter occurred in March of 1986, at

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which time he was able to perform all aspects of a First Class Firefighter's duties.

On October 15, 1986, Mr. Wellington suffered a work-related back injury, which resulted in his being transported to the Peel Memorial Hospital emergency centre by ambulance. He was prescribed a muscle relaxant (Diazepam) by his family doctor in an attempt to relax the muscle spasms he was experiencing in his right leg.

Six weeks after he injured his back, he had a CT scan which indicated that there were no signs of a recurrence of his brain tumour. Around the same time, he was taken off the muscle relaxant and he, again, started to experience spasms on the right side of his lower back. As a result, he again attended on his family physician who advised him to remain off work because of his back injury. A claim for Workers' Compensation benefits was filed because of this injury, which claim was eventually approved.

While receiving WCB benefits, Mr. Wellington attended on Dr. Kostuik, an orthopaedic surgeon at the Toronto General Hospital, who prescribed a course of physiotherapy and also prescribed a muscle relaxant and an anti-inflammatory drug.

Approximately in February of 1987, Mr. Wellington approached the Brampton Fire Department in response to a request for

applicants to go into the Training Division. Another applicant, Captain Brian Scott, was awarded the position.

In July of 1987, during one of his monthly contacts with Chief Core, Mr. Wellington advised that his physical condition (his back problem) was such that he could not then return to active firefighting, but he could accept a moderate duty position elsewhere within the Fire Department. What he was seeking was another office position or some other position that would not place a strain on his back while he was recovering from his back injury. (Transcript, Volume 1, p. 99)

Chief Core indicated that there was nothing available for Mr. Wellington at that time that would meet his needs.

Mr. Wellington was offered a moderate duty position in the Communications Division which he accepted because he felt that he was being threatened with dismissal if he failed to return to work. At that time, although he felt capable of performing moderate duty work (Transcript, Volume 1, p. 110), he was still suffering considerable pain in his lower back and was also experiencing back spasms. He regarded the physical layout of the Communication Division as making "things very uncomfortable [for himself]." (Transcript, Volume 1, p. 113). Mr. Wellington became a First Class Communication Operator in the Communications Division around May of 1988.

Mr. Wellington indicated that he experienced psychological difficulties arising out of the requirement that he answer 911 calls, and he referred specifically to calls from people who were contemplating suicide. (Transcript, Volume 1, p. 121)

He regarded the work of a Communications Officer as being more stressful than that of a First Class Firefighter: "In Communications you're actually dealing with that person and dealing with their problems and hearing their problems. And what was happening was I had a problem with ... that, plus the fact that after I dispatched the calls I was almost like reliving the call, and it made it more stressful for me because I was always anticipating, like when are there guys going to get to the call, they've been a long time. Why isn't anybody calling back?" (Transcript, Volume 1, pp. 121-22)

He said that the second stint in Communications was more stressful because during the first period when he worked there for approximately three months, an experienced Communication Officer took care of the calls and he typed out reports. He also referred to his involvement with the occurrence cards.

The second appointment to the Communications Division was to be for an initial period of six months, and Mr. Wellington was informed of this by then Chief Core by letter dated August 26, 1987. (Exhibit 1, Tab 12)

Mr. Wellington stated that around November of 1987, prior to the completion of the temporary six month placement in the Communications Division, he was approached by then Deputy Chief Clark who asked him if he would consider accepting a full-time position in the Communications Division as a Communications Operator. Mr. Wellington stated that he expressed his concern because the six month period had not yet expired and he would first have to discuss the matter with his wife and consider the effect that it might have on his opportunity to apply for another position with the Fire Department. He also wanted to consider his chances of returning to full-time firefighting in the event that he fully recovered from his back injury.

Mr. Wellington then spoke with George Begley, the then President of the Association to arrange for representation in negotiating a transfer to Communications so that all of Mr. Wellington's concerns could be dealt with. A number of matters intervened and Mr. Wellington was notified by Deputy Fire Chief Clark on February 26, 1988 (Exhibit 1, Tab 17) that Marilyn Nowak, the Communications Operator who was on leave, would be returning to work and his final shift in the Communications Division would be the night shift on March 24, 1988.

At that point Mr. Wellington had not recovered from his back injury and he was not able to return to the position of Firefighter.

Ms. Nowack did not return to work and Deputy Chief Clark sent a memorandum to Mr. Wellington dated March 15, 1988 confirming that effective April 1, 1988 he would be transferred to the Communications Division on a one year trial basis as a First Class Communications Operator. There was also a statement that if a vacancy occurred in another Division in the future, Mr. Wellington would be eligible to apply if he had the physical ability to perform the job.

Mr. Wellington referred to the contents of Exhibit 1 Tab 18 as being the outcome of an agreement between the Association and Deputy Chief Clark and Fire Chief Core. In accordance with Exhibit 1, Tab 18, Mr. Wellington's wages were to be red-circled at those of a 1988 First Class Firefighter's.

Although Mr. Wellington indicated that he accepted the offer because he feared that he would otherwise be without a job, he also indicated (Transcript, Volume 2, p. 23) that the agreement gave him something that was very important to him: the opportunity to apply to another Division within the Department and possibly, if he recovered from his back injury, an opportunity to go back into the Firefighting Division. As a result of Exhibit 1, Tab 18, Mr. Wellington remained in the Communications Division and on April 1, 1988 became a full-time Communications Officer.

In May of 1988, Mr. Wellington was diagnosed with another brain tumour. Again surgery was recommended. The diagnosis followed a regular six-month checkup and, to that time, Mr. Wellington hadn't experienced any symptoms associated with a brain tumour. A second operation was conducted around June of 1988 and Mr. Wellington did not return to work until January of 1989. After returning to work, he had knee surgery and he recalled being off work again for approximately two weeks. He later clarified his answer and explained that although the recuperation period was for a period of two weeks, he believed that he only missed about five days of actual work.

On a number of occasions Mr. Wellington repeated his earlier evidence that he found working in the Communications Division to be immensely stressful, with special reference being made to dealing with 911 calls and:

... listening to people that were in a panic state and trying my darndest to get help to them. ...

(Transcript, Volume 3, p. 26)

As a result of the stress experienced by him when working as a Communications Operator, Mr. Wellington went to the Employee Assistance Program provided by the Employer, where he received counselling from a therapist, Heater Kaufman. He believes that he attended at the Employee Assistance Program around July of 1989, and it was in August of 1989 that he was again diagnosed as having a small brain tumour. At the time of the diagnosis, Dr. Gentili recommended that Mr. Wellington wait for a follow-up CT scan and a

follow-up M.R.I. scan. Dr. Gentili recommended that Mr. Wellington wait for a period of six months before any further action was taken, as he was not feeling any symptoms at the time and as the tumour was perceived to be a small one. In addition, a biopsy of his second brain tumour revealed that it was benign.

Mr. Wellington testified that the combination of stress because he had a brain tumour, along with the stress from the Communications Operator's job, made his situation doubly stressful. He saw Ms. Kaufman once a month for three months and also spoke to her on the phone once a week during the three month period. He testified that the problems he experienced in the Communication Operator position were not alleviated by his discussions with Ms. Kaufman.

He added that about the time that he was seeing Ms. Kaufman he started to experience further health problems, identified as stomach pains. On self-examination he found a small lump on his back and he again went to see Dr. Gentili.

Mr. Wellington reported the problem he was having with stomach pains to District Chief Harry Newlove and informed him that he had seen his neurosurgeon.

Around this time, Mr. Wellington again went off on sick leave. He described a number of difficulties he was having and added: "At

that point I felt my mind wasn't on the job and I had to leave." (Transcript, Volume 3, p. 44).

Mr. Wellington recalled mentioning the lump to District Chief Newlove when he asked for sick leave and recalled that he went on sick leave around September 20, 1989.

After seeing Dr. Gentili about the lump on his back, Mr. Wellington had further surgery performed on him by Dr. Gentili at Scarborough Grace Hospital, where a small fibroma was removed from the lower portion of his back in October of 1989.

There was a suspicion that Mr. Wellington had neurofibromatosis, although he did not have any of the external manifestations of that disease. He again went to see Dr. Zaitlen, who concluded that there was a possibility that Mr. Wellington had neurofibromatosis but noted the absence of other external signs indicative of that disease.

Once the fibroma had been removed, Mr. Wellington ceased to have stomach pains.

After the operation in October of 1989 for the removal of the fibroma, Mr. Wellington did not return to work because of his brain tumour and because he felt he could not work in Communications

because of the stress that he experienced when he worked there.
(Transcript, Volume 3, pp. 49-50)

Mr. Wellington referred to an interoffice memorandum under the heading "Community Services Department Office of the Fire Chief" dated January 5, 1990 (Exhibit 1, Tab 19) which is as follows:

1900 01 05

To: All Personnel 90-05

From: Deputy Chief V. Clark

Re: Division of Fire Prevention

We are now accepting applications from Members of this Department who might wish to transfer to the Division of Fire Prevention.

Anyone who is interested is to submit an application and resumé to Administration on or before noon, Thursday, February 1, 1990.

Attached is a list of the desired qualities for this position.

Applicants will be notified of time and date for interviews.

Verrall Clark,
DEPUTY FIRE CHIEF

FIRE PREVENTION DIVISION

- * Have attained the rank of First Class Firefighter.
- * Be physically capable of performing all duties as may normally be assigned.
- * Demonstrate the ability to clearly express themselves orally.

- * Demonstrate the ability to clearly express themselves in writing.
- * Demonstrate the ability to conduct a comprehensive inservice inspection to conclusion.
- * Demonstrate a knowledge of basic Fire Prevention practices and procedures as contained in the Department Training Manual.
- * Demonstrate through tests or interview or both, the ability to communicate with the public relevant to Fire Code enforcement and Fire Prevention education with tact and discretion while retaining respect and authority.

Supplementary Qualifications:

- * Knowledge of basic construction methods and materials.
- * Practical experience in construction trades.
- * Ability to read mechanical or architectural plans
- * Knowledge of data processing and or computer use.
- * Completed supplementary educational courses that could directly or indirectly benefit the applicant.

Mr. Wellington applied for the position by letter dated January 30, 1990. (Exhibit 1, Tab 20)

Mr. Wellington stated that he applied for the Fire Prevention Officer position in the Fire Prevention Division after concluding that he could no longer work in Communications because of the stress level that he experienced there and because Fire Prevention provided "a less stressful environment." (Transcript, Volume 3, p. 52)

Mr. Wellington testified about his understanding of the position of Fire Prevention Officer at pp. 52-53 of Volume 3 of the Transcript:

Q. What is your understanding about what the job entailed?

A. My understanding of the job is paperwork, eight hour shifts, day shift, you take -- you inspect buildings, inspect -- go out to do fire drills at schools, look at plans for new occupancies, new buildings and industrial occupancies, commercial plazas, inspection of sprinkler systems, basically doing -- that's it.

Q. How did you know about what the job entailed?

A. It was through my experience as being -- the years on the Fire Department. We've had to work in conjunction with Fire Prevention as firefighters, because to be a good -- to extinguish fires you have to know how to prevent them. So, we had formal -- some training from Fire Prevention Officers and so that's why I knew what the job entailed.

Q. Did you know anything about the stress levels of that job?

A. I took the stress levels to be low.

Mr. Wellington believed that the stress level of the Fire Prevention Officer position was lower than that of a Communication Operator because:

In the past, fire prevention was used as an alternative to First Class Firefighters after having illnesses and unable to return to firefighting.

Q. What kinds of illnesses are you referring to?

A. Heart attacks, heart operations, strokes and that kind of --

(Transcript, Volume 3, p. 54)

Mr. Wellington believed that his past experience as a firefighter and the fact that he had written the captain's exams in 1986, were positive factors in his favour in the competition. He reviewed the list of qualifications being part of Exhibit 1 Tab

19 in explaining why he thought that he was qualified for the position. His evidence with respect to his having the necessary qualifications for the position is found at pp. 56-68 of Volume 3 of the Transcript.

Prior to attending the interview, Mr. Wellington went to the Brampton Fire Department Training Division and obtained information pertaining to the Fire Department manual, the Ontario Fire Code, updates on sprinkler systems, alarm systems and information on the Occupational Health and Safety Act, along with updates on arson, cause and detection. The documents that he obtained were marked as Exhibit 6 to these proceedings.

The interview panel was made up of then Fire Chief Core, then Deputy Fire Chief Clark and District Chief of Fire Prevention Ron Weir. Mr. Wellington made notes of the interview approximately 15 minutes after its conclusion.

The interview took place on March 2, 1990. Mr. Wellington recalled that after formal introductions he was informed by Fire Chief Core that the Employer was considering a Third Class Firefighter for the position of Fire Prevention Officer. Mr. Wellington stated that he did not have a problem with that fact as he did not consider a Third Class Firefighter to be a serious challenger. He was more concerned with the candidacy of another firefighter, R. G. Lale.

Mr. Wellington recalls Chief Core asking him questions about the prognosis of his brain tumour and he responded that his neurosurgeon had told him that there was a possibility that it would not grow. He added that he could still function. (Transcript, Volume 3, p. 74)

Mr. Wellington stated that the next question was asked by District Chief Weir, who asked him if he would have applied for the position of Fire Prevention Officer if he were not sick. Mr. Wellington replied that he would have done so even if he was in firefighting because a person can only be a firefighter up to a certain age and in applying for the Fire Prevention Officer position he was looking to his "future." (Ibid.)

He also recalled Deputy Chief Clark asking him if he knew "the entire Ontario Fire Code." (Transcript, Volume 3, p. 75) Mr. Wellington replied that he only knew that portion that pertained to the Brampton Fire Department training manual. A similar question was asked of him in connection with the entire Ontario Fire Code. He replied that he did not know anyone who knew the entire Ontario Fire Code.

Mr. Wellington then referred to a statement made by Fire Chief Core who was said to have indicated that he had a concern about the Fire Prevention Division because due to retirement and the age of the people who were working there: "We are looking for young

healthy people." Mr. Wellington stated that he replied that he could not guarantee his health a hundred per cent, acknowledging that his tumour could grow, but that he wasn't anticipating that this would happen.

Fire Chief Core is then supposed to have asked whether Mr. Wellington foresaw any problem in obtaining his doctor's consent to return to work. Mr. Wellington responded that he could not foresee any such problem.

District Chief Weir is then supposed to have asked if Mr. Wellington was aware that there was stress in the Fire Prevention position. He answered that there was stress in any job but that the Fire Prevention position didn't have the "stressful emergency environment of Communications." (Transcript, Volume 3, p. 85)

Chief Core is then supposed to have indicated that Mr. Wellington's brain tumour could be considered to be a disability. Mr. Wellington replied that he didn't consider his brain tumour as a disability in the sense that it did not have any adverse affect on him physically. Mr. Wellington noted that the interview took approximately 13 minutes. This was based on his having examined his watch before he went into the interview room and again looking at it as he came out.

Upon receiving a letter from Deputy Fire Chief Clark, dated March 9, 1990, indicating that he had not received the position Mr. Wellington was disturbed and concluded that he had been discriminated against because of his health and felt: "that if my physical condition was being questioned for that position, then ... -- where else am I going to go in the Fire Department?" (Transcript, Volume 3, p. 88)

Mr. Wellington did not then go back into the Communications Operator position because of the stress that he experienced when he worked there. (Ibid.)

In May of 1990, on the recommendation of Ms. Kaufman, Mr. Wellington commenced treatment with Dr. Brian Jordan, a psychiatrist.

Around this time, Mr. Wellington had another M.R.I. scan which disclosed that he had yet another brain tumour. Dr. Gentili recommended that because it was small the situation should be monitored for six months followed by another M.R.I. scan.

When Mr. Wellington was away from work he was on sick leave and he referred to art. 12.02 of the collective agreement in force at the time. (Exhibit 1, Tab 4)

Art. 12.02, referred to by the Grievor, is as follows:

Should an employee's sick pay credits expire, other members of the Association shall be permitted to replace said employee for a period not to exceed two (2) years, subject to the agreement of Council.

Mr. Wellington, pursuant to art. 12.02, had other employees work for him. The rate of pay being paid to him was that of a First Class Firefighter's salary as at 1988. He testified that the six month brain scan revealed that the fourth brain tumour had grown slightly and surgery was performed in March of 1991. Members of the Fire Department continued to work for him and he continued to receive payment at the rate above noted.

The two year period that Mr. Wellington could be replaced by employees under art. 12.02 was up on October 2, 1991.

In cross-examination, Mr. Wellington acknowledged that the Fire Department, through its representatives such as then Deputy Chief Clark, had a history of endeavouring to accommodate injured firefighters, to the extent that he was surprised that he had not received the same treatment in March of 1990 (Transcript, Volume 3, p. 155). He reiterated the shock that he felt when the Fire Prevention Officer position was given to a Third Class Firefighter (Neil Kennedy), although he acknowledged that he knew little else about Mr. Kennedy's qualifications for the position (Transcript, Volume 3, p. 157). Mr. Wellington did not speak with Deputy Chief Clark about why Mr. Kennedy had been given the position, nor did he ask Messrs. Core, Weir or Clark why he had not been given the job.

Further in cross-examination, Mr. Wellington acknowledged that since 1978 when he started with the Fire Department there were new types of fire hazards because of types of chemicals that are commonly used and that there are new hazards associated with fire fighting and new techniques of fire fighting (Transcript, Volume 4, p. 2).

He also agreed that there was new equipment introduced from time to time and new procedures developed to take into account the new equipment, new techniques and new hazards. (Transcript, Volume 4, p. 3)

Mr. Wellington indicated that the changes referred to were dealt with by the Fire Department through training sessions. At the time that he was a firefighter (to October of 1986) approximately an hour a day was set aside for training, although this would not always happen if it was a busy day. Although he was unaware of this, training time had been increased by the time of the hearing by 50 per cent, the target now being an hour and a half a day. Mr. Wellington then amended his answer to say that the target when he was a firefighter was an hour and a half a day. (He also acknowledged that his initial training period had been for a period of four (actually 120 hours) and not six weeks (Transcript, Volume 4, p. 19).)

After acknowledging that his training course on joining the Fire Department was four weeks, Mr. Wellington stated that he did not know the length of the basics training course taken by Mr. Kennedy.

When Mr. Wellington was assigned to a station in 1978, the training received by him was on the job training given by the Captain. Lectures given by the Captain were repeated every year, subject to updating. Mr. Wellington agreed that for the most part the topics dealt with in Exhibit 2, being the division of training firefighter classification in 1975, were mostly about firefighting or fire suppression issues, with some training in the area of fire prevention. Two of the areas that he testified about related to the sprinkler and alarm systems referred to at p. 5 of Exhibit 2 and fire prevention duties of the Fire Prevention Division found at p. 6.

Mr. Wellington was asked a number of questions relating to fire prevention and had difficulty answering them, indicating that given the passage of time he had forgotten a number of things that he once may have known. (Transcript, Volume 4, p. 35)

Mr. Hines asked Mr. Wellington a number of questions relating to the Fire Prevention Officer's position and Mr. Wellington was frank in acknowledging that the questions were ones that might be asked of a Fire Prevention Officer and were relevant. He was also

frank in acknowledging that the kinds of questions Mr. Hines asked that would be relevant in 1990 were not dealt with by him up to the time that he left the firefighter's position in 1986. He also acknowledged that the questions asked were those that a sprinkler system specialist would be expected to answer. (The successful candidate, Mr. Kennedy, was such a specialist.)

Mr. Hines repeated the same exercise with respect to alarm systems with the same result.

Reference was also made to in-service home inspections, and Mr. Wellington could not recall having received such instruction during his initial training period of four weeks.

He was unaware that Mr. Kennedy, after he joined the Department, had received such in-service training as a new recruit as part of basic training.

Mr. Wellington acknowledged that the kind of knowledge that he had with respect to inspections was restricted to residential types of inspection as compared to business or even small apartment building inspections; the inspection of business locations and small apartment buildings being performed by Fire Prevention Officers. (Transcript, Volume 4, pp. 42-3)

Mr. Wellington was directed to the fifth item of the advertisement for the Fire Prevention Officer's position: "Demonstrate the ability to conduct a comprehensive in-service inspection to conclusion," and to the fact that he had indicated that he felt that he could do that. He also acknowledged that his experience in this area was largely restricted to the home inspection program. (Transcript, Volume 4, p. 59) He also acknowledged (Transcript, Volume 4, p. 60) that apart from the training that he received from his captain while he was a firefighter, he had not received any other training in conducting in-service inspections. He also acknowledged (Transcript, Volume 4, p. 61) that in 1990 Fire Prevention Officers did not perform residential inspections which were left to firefighters. He further acknowledged (Transcript, Volume 4, p. 62) that even in 1986 when Mr. Wellington was a firefighter, Fire Prevention Officers were not performing residential inspections. He acknowledged (ibid.) that Fire Prevention Officers were performing more sophisticated inspections, examples given being small apartment buildings to small businesses right up through large companies such as General Motors and Northern Telecom.

Mr. Wellington also acknowledged (Transcript, Volume 4, p. 67) that even in 1986 it was the Fire Prevention Officers who were responsible for ensuring Fire Code compliance and not firefighters.

Mr. Wellington acknowledged (Transcript, Volume 4, p. 71) that firefighters' inspection responsibilities had moved from residential inspections into the low-end commercial-industrial inspections.

Mr. Wellington acknowledged (Transcript, Volume 4, p. 77-3) that he had never actually performed an in-service mercantile inspection as would be performed by a First Class Firefighter in 1990. He was also unaware that even Fourth and Third Class Firefighters were performing such inspections at that time.

Mr. Wellington acknowledged that persons who had attended the six month course at the Fire College at Gravenhurst, Ontario would be better able to become Fire Prevention Officers than would be the case before they attended the course. (Transcript, Volume 4, p. 85)

Mr. Wellington referred to the "Hazmat" program which was introduced about the time that he ceased to function as a firefighter in 1986, which program dealt with the handling of hazardous materials. He indicated that there was a "Hazmat" team in place about the time when he ceased functioning as a firefighter. (Transcript, Volume 5, p. 66)

He agreed that experience with hazardous materials would very likely be useful to a Fire Prevention Officer inasmuch as Fire Prevention Officers had, as part of their responsibilities, the

duty to inspect industrial work sites. (Ibid.) He acknowledged that he did not have an opportunity to participate on a "Hazmat" team. He also acknowledged (Transcript, Volume 5, p. 67) that Chief Core, then Deputy Chief Clark, and Mr. Weir would have been aware at the time that they interviewed him that he had not received any active training in firefighting or related matters for about three and a half years prior to the interview; that he missed whatever training was associated with the mercantile inspection program and that he would not have had an opportunity to become involved in the hazardous material team.

Mr. Wellington also acknowledged (Transcript, Volume 5, p. 70) that he was not aware whether a Fire Prevention Officer was empowered to enforce the Occupational Health and Safety Act.

Mr. Wellington acknowledged (Transcript, Volume 5, pp. 79-80) that his knowledge of the Fire Code at the time of the interview was essentially the knowledge he had when he was a First Class Firefighter in 1986.

Mr. Wellington acknowledged that Chief Core and Deputy Chief Clark would have known, at the time of the interview, that his reference to in-service inspections would have meant the home inspection program of the early 1980's. (Transcript, Volume 7, p. 83)

Mr. Wellington acknowledged (Transcript, Volume 7, p. 84, that Chief Core and Deputy Chief Clark would have been familiar with the kind of training that he had received with respect to sprinkler and alarm systems as a First Class Firefighter in the period from 1973 to 1986.

He also acknowledged (Transcript, Volume 7, p. 85) that Chief Core and Deputy Chief Clark would have known about any current training as a firefighter received by him since the fall of 1986.

He acknowledged (ibid.) that they would know that he had no opportunity to train for or become part of the mercantile inspection program or to train or become part of the "Hazmat" team.

Mr. Wellington acknowledged (Transcript, Volume 7, pp. 86-7) that Chief Core and Deputy Chief Clark would have been aware that in terms of Fire Code enforcement, it was not his responsibility as a First Class Firefighter to communicate with the public but rather with his superior officers.

Mr. Wellington acknowledged that if Neil Kennedy had not been awarded the Fire Prevention Officer position then the other candidate R.G. Lale was "a definite candidate." (Transcript, Volume 7, pp. 88-9)

He noted that Mr. Lale was senior to him by a number of years but was not aware of the suggestion made to him that Mr. Lale had Fire College experience.

Reference was made to Tab 22 of Exhibit 1, being Mr. Lale's application for the Fire Prevention Officer position, where it was noted that he had completed firefighter courses and all the firefighter related courses at the Ontario Fire College at Gravenhurst. Mr. Wellington acknowledged that Mr. Lale was more qualified than himself "in that respect" and had more current training experience within the firefighting unit. (Transcript, Volume 7, p. 90)

Mr. Wellington acknowledged that if he had been selected for the position of Fire Prevention Officer he would have to receive substantial training and would have to be sent to the Fire College. He understood that there would probably be several months of "junioring or apprenticing to an experienced Fire Prevention Officer." (Transcript, Volume 7, p. 106)

Mr. Wellington was asked the following question in cross-examination:

Would it be fair to say that in terms of past history, Chief Core and Deputy Clark, rather than having demonstrated discrimination against disabled firefighters had seemed if anything to give a special consideration?
(Transcript, Volume 3, p. 18)

His initial answer: "It - - in accommodation some people, yes", was not clear to me and I asked him if he was agreeing with the question, and he answered "Yes" As his answer appeared to be stated with some uncertainty I asked him if he was only partially agreeing with the question and he answered "Yes." Mr. Wellington was referring to one case (he could not remember the name of the person involved) where he believed accommodation was not offered. He could furnish no further details of the case.

Mr. Wellington, in re-examination, acknowledged that he did not speak to any of Chief Core, Deputy Chief Clark or Mr. Weir after the interview for the Fire Prevention Officer position even though he was very upset about what had taken place. He did not know why he had not spoken to them.

The Commission called George Wood, who has been employed by the Brampton Fire Department for approximately 25 years and whose present position is that of Fire Prevention Officer with the rank of Lieutenant, a position he has held for approximately 20 years. Lieutenant Wood testified that in the last few years most recent Fire Prevention Officer appointees have been hired without first having been firefighters. (Transcript, Volume 5, p. 132) He also stated that they came from highly technical backgrounds. (Ibid.)

Lieutenant Wood referred to a number of examples of persons without firefighting qualifications but with specialized technical

qualifications who were hired directly as Fire Prevention Officers. He mentioned Sean Spiers, who had worked with a major fire alarm manufacturer and designer. He also referred to Linda Pierce. Ms. Pierce was said to have come from the City of Brampton Building Department where she was a specialist in building construction and planning examination, referred to by Lieutenant Wood as "para-engineering." (Transcript, Volume 5, pp. 133-4)

Lieutenant Wood indicated that prior to the two persons referred to being hired, Neil Kennedy was appointed as a Fire Prevention Officer. He agreed that Mr. Kennedy was hired at a "transitional point, in the sense that [he had] firefighting experience, but also had a very sophisticated technical background in the Fire Prevention area." (Transcript, Volume 5, pp. 134-5)

Lieutenant Wood also acknowledged that where a professional firefighter, without additional training in fire prevention, was appointed they would usually require additional training in fire prevention before they could become Fire Prevention Officers. (Transcript, Volume 5, p. 135)

Lieutenant Wood also referred to another group of appointees to the Fire Prevention Officer position who all had some special training. An example given was Al Yates, who had been Chief of the Fire Department at Elliot Lake, who had taken a number of courses at the Fire College at Gravenhurst, including fire prevention

courses; Charles Martin, who had been a firefighter with the Employer holding the rank of Captain. It was acknowledged that Mr. Martin had attended the Fire College at Gravenhurst and taken specialized courses on fire prevention, receiving a diploma involving fire technology. (Transcript, Volume 5, p. 136)

Reference was also made to Captain James Lindsay, who had been with the Employer before being appointed as a Fire Prevention Officer, who had taken courses in fire prevention at the Fire College in Gravenhurst.

Reference was also made to John Terry, who had been a firefighter before becoming a Fire Prevention Officer, who had taken post secondary education in building sciences and who specialized in this area as a Fire Prevention Officer. (Transcript, Volume 5, p. 137-8)

Lieutenant Wood also testified that he had taken a specialized course in fire prevention technology before he became a Fire Prevention Officer.

Lieutenant Wood also testified about the transition from the home inspection program conducted by firefighters to the mercantile inspection program that was in place by 1990, where firefighters would receive a three-day training period prior to entering the mercantile inspection program. Firefighters who completed the

three-day basic training were then instructed in the field by a Fire Prevention Officer. The Fire Prevention Officer was there to answer questions. (Transcript, Volume 5, p. 143) Lieutenant Wood acknowledged that mercantile inspection represented a "very technical area." (Transcript, Volume 5, p. 144)

In response to a question as to whether the previous home inspection program was "generally a public relations exercise," Lieutenant Wood stated (Transcript, Volume 5, p. 146): "A great part of it was public relations, and the fire safety awareness program was there" Lieutenant Wood agreed that there was no comparison between the home inspection and the mercantile inspection programs "apart from common sense." (Transcript, Volume 5, p. 150)

Chief Clark, was called as a witness on his own behalf and on behalf of the Respondent, Corporation of the City of Brampton Community Service Department. Mr. Clark was, at the time he gave evidence, Chief of the Brampton Fire Department and had held that position since May 1, 1992. He joined the Chinguacousy Fire Department in June of 1969 as a Fourth Class Firefighter. On January 1, 1974, Chinguacousy merged with the City of Brampton and the Fire Department merged with that of the City of Brampton. At that time, Chief Clark was a Lieutenant, having attained that rank in 1972. He became a Captain in October of 1974 and District Chief in 1979. In February of 1987 he became the Deputy Chief, which

position he held at the time of the interview. At the time Mr. Wellington joined the Department in 1978, Chief Clark was a Captain in the Department.

Chief Clark gave evidence regarding the level of training received by Fourth Class Firefighters in 1978, when Mr. Wellington joined the Department and 1988 when Mr. Kennedy joined the Department. In preparation for giving evidence as to the comparative level of training received by Fourth Class Firefighters on the two dates mentioned, Chief Clark examined the Department archives to obtain evidence concerning the level of training at the earlier date.

Chief Clark testified that in 1978 there was about 120 hours of recruit training that consisted mainly of hydraulics, laying of hose, ladders, breathing apparatus and resuscitation. He stated that none of these areas would involve fire prevention, but involved fire suppression. (Transcript, Volume 12, pp. 5-6) The 120 hours training took three weeks based on a regular 40 hour week.

In 1988 recruits received eight weeks of training and were given exposure to fire prevention through one week's training on the duties of a Fire Prevention Officer, including alarm systems and sprinkler systems.

In 1978 there was no training on the specific subject of hazardous materials. (Transcript, Volume 12, pp. 6-7)

In 1988 recruits received training in hazardous materials (Hazmat). (Transcript, Volume 12, pp. 6-7)

In addition, recruits in 1988 were required to elect a form of specialization in such areas as high level rescue and hazardous materials. This was not the case in 1978 when there were no specialized teams. Specialized teams came into existence in 1987, at which time the history of new employees was reviewed before assigning them to a specialty team which reflected their previous knowledge. (Transcript, Volume 12, p. 7)

Mr. Kennedy had taken chemical training in one of his previous positions and was assigned to the Hazmat team in Station No. 4. (Transcript, Volume 12, pp. 7-8)

In the 1970's firefighters received some exposure to home inspection programs where they did basic home inspections. This form of activity ceased in 1988 and, beginning in 1987, the Department started to perform commercial/industrial inspections referred to as mercantile inspections. (Transcript, Volume 12, p. 8)

For this reason the training received by Mr. Wellington in home inspections was of no practical value by 1988. Furthermore, this training was said to be "extremely basic," along the lines of "a basic home safety inspection."

The training in performing home inspections took approximately a day of hands-on experience. (Transcript, Volume 12, p. 9)

The mercantile inspection training consisted of three days of in-station training conducted by a Fire Prevention Officer, and two days where a Fire Prevention Officer took crews to the site of an industrial inspection area or a commercial inspection area, and the training continued for approximately a further two weeks. (Transcript, Volume 12, p. 10)

Chief Clark testified that the home inspection routine had no relationship to the Fire Code, however the Fire Code was integrally related to the mercantile inspection. (Transcript, Volume 12, pp. 11-12).

Chief Clark, who had been President of the Brampton Firefighters' Association in 1975, 1976, 1982, 1983, 1984 and 1985, and President of the Provincial Firefighters' Association in 1985, 1986 and part of 1987, testified that he regularly took the position that the Department should support disabled firefighters

Core and Mr. Weir the Director of Fire Prevention. (Transcript, Volume 12, pp. 109-10)

The drafting of the document (Tab 19, Exhibit 1) represented Chief Clark's first experience in drafting job postings. (Transcript, Volume 12, p. 110) He now assigns this task to persons in the Human Resources Department of the Employer. (Ibid.)

Neither Chief Core nor District Chief Weir had any special training or experience in drafting job postings. (Transcript, Volume 12, p. 111)

Although Chief Clark inserted the qualification that an applicant be a First Class Firefighter, he testified that he only thought of it as a desired qualification. (Transcript, Volume 12, pp. 111-12)

He expanded on his thinking, stating that if: "... everything else [was] equal, a First Class Firefighter should get the job." (Ibid.)

It was Chief Clark's view that because a number of Fire Prevention Officers would be leaving the Fire Prevention Division around the time of the posting, the Department had an opportunity to improve the Division: to hire or to place people in the Division

With better qualifications than the persons they replaced.
(Transcript, Volume 12, p. 113)

Chief Clark testified that Mr. Lale had been in the Department for 18 years and Mr. Wellington for 12 years at the time of the competition. (Transcript, Volume 12, p. 115)

Chief Clark took into consideration the fact that Mr. Lale had attained Acting Captain's status. That is, he would have written and passed the exam referred to by Mr. Wellington. (Transcript, Volume 12, p. 116) On occasion, Mr. Lale would have acted as a captain in the absence of a captain because of illness, vacation et cetera.

Chief Clark was affected by the fact that Mr. Lale had attended the Fire College and had taken a 22 week course: eight weeks of firefighting, eight weeks of fire prevention and six weeks of administration. (Transcript, Volume 12, pp. 116-17)

Chief Clark was aware of the fact that Mr. Wellington had not been an active firefighter for some three and a half years prior to the interview. He was therefore aware of the fact that Mr. Wellington had not been trained in mercantile inspection, would not have received the regular day-to-day and week-to-week training in the fire stations for the three and a half year period and would

not have received any particular exposure to hazardous materials or Hazmat training. (Transcript, Volume 12, pp. 117-18)

Mr. Lale, to the knowledge of Chief Clark, had been an active firefighter to around eight months before the competition. He had been away from work for approximately eight months with heart problems. (Transcript, Volume 12, p. 118)

According to Chief Clark's information, Mr. Lale would have completed the mercantile inspection training program. (Ibid.)

Chief Clark regarded Mr. Lale as being the better qualified employee for the position. (Transcript, Volume 12, p. 119)

If Mr. Kennedy had never applied for the job and the only candidates to choose from were Mr. Wellington and Mr. Lale, Chief Clark would have awarded the job to Mr. Lale. (Transcript, Volume 12, p. 120)

Chief Clark testified that in a competition involving Mr. Lale, Mr. Wellington and Mr. Kennedy, he would have awarded the job to Mr. Kennedy because: he "had overwhelming qualifications for the job." (Transcript, Volume 12, p. 121)

At the time that Mr. Kennedy received training given to new recruits, Chief Clark was aware that he had instructed the other

recruits in the areas of sprinklers, fire alarms, detection systems and general Fire Code requirements. (Transcript, Volume 12, p. 121)

Chief Clark was also aware of the fact that Mr. Kennedy had been seconded to train other firefighters in alarm systems and sprinkler systems. (Transcript, Volume 12, pp. 121-2)

Chief Clark was aware of the work history of Mr. Kennedy at the time of the interview: that he had worked for Edwards of Canada (a fire alarm company) for approximately eight years and had taken courses at Seneca College on alarm systems and various areas of construction under the Building Code and Fire Code. (Transcript, Volume 12, p. 122)

Chief Clark understood that the course taken by Mr. Kennedy at Seneca College was aimed at qualifying him for work in the field of fire prevention. (Ibid.)

Chief Clark was also aware of the fact that Mr. Kennedy had a background involving working with chemicals and it was for this reason that he was initially assigned to the Hazmat team. He testified that this would be of assistance as a Fire Prevention Officer because Fire Prevention Officers are required to perform inspections in locations where hazardous chemicals are kept. Mr. Kennedy was familiar with the various methods of dealing with such

chemicals and with extinguishing fires where they were involved. (Transcript, Volume 12, p. 123)

Chief Clark did not regard Mr. Wellington's basic home inspections as being a quality looked for in an applicant for the Fire Prevention Officer position. He regarded Mr. Wellington's experience as being limited to basic home inspection and not the comprehensive in-service inspection he described. (Transcript, Volume 12, p. 124)

Chief Clark testified that he received the résumés for Messrs. Wellington, Lale and Kennedy prior to the interview and reviewed them. After doing so he concluded that based on the qualifications set out in the respective résumés Mr. Kennedy was far and away the most qualified candidate based on the requirements of the position as they existed at the time. (Transcript, Volume 12, p. 125)

Chief Clark also testified that he did not know very much about the state of Mr. Wellington's health at the time of the interview and made the decision based on Mr. Wellington having the necessary physical attributes to perform the Fire Prevention Officer position. Based on the qualifications of the candidates, and those qualifications alone, he concluded that Mr. Kennedy was the clearly superior candidate. (Transcript, Volume 12, pp. 126-27)

In assessing Mr. Wellington's qualifications relative to the then approximately nine members of the Fire Prevention Division, Chief Clark testified that, in his view, Mr. Wellington had fewer qualifications than anyone who had gone into the Division, referring to the fact that every other member of the Fire Prevention Division had gone to the Ontario Fire College and completed the eight weeks Fire Prevention course. (Transcript, Volume 13, p. 2)

Referring to Don Caie, Chief Clark stated that he could not recall whether Mr. Caie held an officer rank before joining Fire Prevention and stated that he was a former police officer who had performed a lot of investigative work. Chief Clark also knew that when Mr. Caie came into the Fire Prevention Division he was the main arson investigator for the Fire Department. (Transcript, Volume 13, p. 3)

Chief Clark testified that Mr. Kennedy's qualifications at the time of the competition, when compared with those of the other members of the Fire Prevention Division when they first joined the Division, indicated that he (Mr. Kennedy) would be the best qualified member of the Division at that point in time because of his past experience with alarms and sprinkler systems and because of the courses that he had completed at Seneca College. (Transcript, Volume 13, p. 4)

Chief Clark also testified about a practice in the Brampton Fire Department: where two candidates for a position had equal skill and ability and one was disabled for firefighting, the disabled employee would be chosen for a job in staff divisions such as the Fire Prevention Division. (Transcript, Volume 13, pp. 24-5)

Chief Clark indicated that he knew of no physical or mental problem suffered by Mr. Wellington that would interfere with his performance as a Fire Prevention Officer position. (Transcript, Volume 13, p. 26) Chief Clark testified that he had no indication that the statement contained in the application letter sent by Mr. Wellington: that he was physically capable of handling all aspects of the position was incorrect. (Transcript, Volume 13, p. 28)

Chief Clark also testified that since Mr. Kennedy was hired as a Fire Prevention Officer an additional six persons had been hired for that position, none of whom were former professional firefighters. He described the persons hired as bringing to the Division expertise in alarm systems, sprinkler systems and plans examination, the latter involving a knowledge of both the Building Code and the Fire Code. (Transcript, Volume 13, p. 46)

The newly hired persons, with special expertise, performed the full spectrum of fire prevention duties but specialized in their particular area of expertise. (Transcript, Volume 13, p. 47) The decision to change the focus of the Fire Prevention Division was a

unconscious one based on a need to upgrade the Division to respond to changes in the legislation relating to fire prevention. (Transcript, Volume 13, p. 47)

In cross-examination, Chief Clark testified that Mr. Wellington, even after training, would not have attained the standards of performance that Chief Clark was looking for. (Transcript, Volume 13, p. 115) Chief Clark indicated that the standards that he had set required persons with specialized training to assume the role of Fire Prevention Officer. (Transcript, Volume 13, p. 117) Further in cross-examination, Chief Clark clarified his position by stating that the Fire Prevention Officer position, based on changing conditions, was upgraded on a regular basis. He stated that at one time lesser qualifications were sufficient, but changing conditions required an upgrading of the position. He further elaborated his position by stating that those in the Department in 1990 would not have been capable of performing the position based on the newly established standard. (Transcript, Volume 13, pp. 118-19) Chief Clark, in making the latter comment, indicated that it was in the area of demonstrated expertise that the incumbents would have fallen below the new standard demanded by him. (Transcript, Volume 13, p. 120)

At Volume 13, p. 121, Chief Clark stated that:

I am saying everybody in the Division was a general type Fire Prevention Officer. Neil Kennedy could become a general Fire Prevention Officer, but he would have a

specialty, that no one else in that Division had, of sprinklers and alarms.

If we had ... hired Doug, he would have been, in my estimation, an average general Fire Prevention Officer and I was looking to improve that Division.

Chief Clark explained the change in direction of the Fire Prevention Division in 1990 as coming about because this represented: "the first opportunity to start upgrading that Division." (Transcript, Volume 13, p. 123)

Former Chief William Core also testified on behalf of the Respondents. He has, since the time of the competition, retired from the Brampton Fire Department. After completing grade 12 and working for another employer for approximately five and a half years, he joined the Brantford Fire Department on December 5, 1960. He was promoted to Captain in 1967 and became District Chief in 1974. In 1979 he was promoted to Deputy Chief. He was Acting Chief for approximately a year and a half around 1986 before being promoted to Chief. He was president of the Brampton Professional Firefighters' Association for approximately 13 years. He retired from the Fire Department on May 1, 1992.

Chief Core testified that he was aware of the fact that Mr. Dale's experience as a firefighter continued until approximately 1990, whereas Mr. Wellington had not been a firefighter since the fall of 1986. (Transcript, Volume 14, pp. 73-4) He was also aware of the fact that Mr. Wellington had not participated in or had

experience in the mercantile inspection program and that Mr. Lale did have such experience. (Transcript, Volume 14, p. 74) In Chief Core's opinion, Mr. Wellington did not have any special credentials that were required in a Fire Prevention Officer. (Ibid.) Chief Core was also aware of the fact that Mr. Lale had a Fire Protection Technology Certificate from the Ontario Fire College, which indicated that he would have fire inspection training. (Ibid.)

Chief Core regarded the home inspection program that Mr. Wellington had participated in as being "basically a public relations program." (Transcript, Volume 14, p. 76) Chief Core also stated that he did not believe that any of the questions on the captain's exam that Mr. Wellington almost passed in the mid-1980's would relate to fire prevention. (Transcript, Volume 14, p. 76)

In referring to Mr. Kennedy's application, Chief Core stated that he was aware of Mr. Kennedy's training in fire alarm systems and that he had a certificate related to architectural design and had taken college courses on firefighting. (Transcript, Volume 14, p. 77)

Chief Core regarded the internal training received by Mr. Kennedy as having a longer duration covering more aspects of the firefighter's job than that taken by Mr. Wellington. (Ibid.)

Chief Core explained that the interview process was carried out notwithstanding the fact that it was apparent to him that Mr. Kennedy was by far the superior candidate, because he considered the possibility of some candidates refusing the job and the job would then be given to the next best candidate capable of doing the job. (Transcript, Volume 14, p. 79)

At the time of the interview, Chief Core was not aware that Mr. Wellington had any physical or mental disabilities that might affect his ability to perform the Fire Prevention Officer job. (Transcript, Volume 14, p. 79)

Neil Kennedy also testified on behalf of the Respondents. Mr. Kennedy joined the Brampton Fire Department in September of 1988. His basic training took eight weeks, during which time he received training in fire prevention practices for about three days. The subjects taught were fire inspections, fire extinguishers, the basic fire triangle, report writing and a small amount about the Ontario Fire Code. (Transcript, Volume 10, p. 15) There was also training on sprinkler systems for two days and one day's training on fire alarms. (Transcript, Volume 10, p. 15) After the eight weeks of basic training Mr. Kennedy was assigned to Station No. 4. While at Station No. 4 he received in-service training on a regular basis including some inspection training. He stated that the ongoing training was conducted weekly with the training usually

taking place Monday to Friday during a week of days - which was once a month. (Transcript, Volume 10, p. 17)

During the course of the training sessions, additional training was given on fire prevention issues such as sprinklers and alarms. He referred to certain other topics: extinguishers, emergency lighting in exits: "that type of thing." (Transcript, Volume 10, p. 19)

Mr. Kennedy said that he first had exposure to the mercantile inspection program in the spring or summer of 1989. The first part of the exposure involved a discussion of the different kinds of forms that had to be filled out and what they meant. (Ibid.) He performed inspections along with his crew in the area around Station 4, identified as the Station 4 response area. (Transcript, Volume 10, p. 20). He was involved in mercantile inspections for four or five months during the summer of 1989 and felt that after that time he was capable of performing such inspections on his own to completion. (Transcript, Volume 10, pp. 20-21)

He was also involved in tours of industrial sites along with his crew, which tours involved pre-planning in the event that a fire occurred. This involved a means of placing trucks on the exterior of a subject building, how to fight the fire on the interior of the building and what equipment would be used. (Transcript, Volume 10, p. 21)

After his first year as a Fourth Class Firefighter, Mr. Kennedy wrote and successfully passed the exam to become a Third Class Firefighter. He stated that his average was 95 per cent. (Transcript, Volume 10, pp. 21-2)

Mr. Kennedy was involved in the Hazmat program; Station No. 4 being identified as the Hazmat station. (Transcript, Volume 10, p. 22) Training was given to the firefighters at the Hazmat station, which training might not necessarily be given to firefighters at other stations. (Ibid.) He stated that Hazmat training throughout a year would have taken up about a hundred hours in the classroom along with 60 hours of practical training. (Transcript, Volume 10, p. 23)

Mr. Kennedy reviewed his application for the Fire Prevention Officer position and referred to the third page headed "education." He identified a course that he had taken at Humber College which he described as an Architectural Design and Drafting course. (Transcript, Volume 10, p. 25) The course required Mr. Kennedy to design a house which would include anything from designing the angles of the walls to how many windows would be needed, to the style of the roof, the style of the house "and everything else." (Transcript, Volume 10, p. 25) The course required students to be able to read drawings and to design a drawing, which he identified as an architectural plan starting from the foundation to

completion. (Transcript, Volume 10, pp. 25-6) The course exposed him to architectural type drawings. (Transcript, Volume 10, p. 26)

At that time (between 1979 and 1981) Mr. Kennedy worked for Dearbourne Chemicals as a lab technician. (Transcript, Volume 10, p. 27) From 1981 to 1988 he worked for Edwards Canada, which is a manufacturer of fire alarm systems. He identified Edwards as being a leader in the field in Canada. (Transcript, Volume 10, pp. 27-3) Mr. Kennedy was a service technical representative for Edwards of Canada, and in that capacity was involved in repairing fire alarm systems, installing new ones and maintaining them. (Transcript, Volume 10, p. 29) In order to qualify for the position, Mr. Kennedy had to have basic electronics, basic electricity - to the high school level. (Transcript, Volume 10, p. 29)

After working six months for Edwards he became a senior technician, which enabled him to become familiar with different types of systems. He then took a one-week in-house course, which took one week. (Transcript, Volume 10, pp. 30-1) The course was a classroom course lasting approximately 40 to 60 hours. (Transcript, Volume 10, p. 31) Throughout the course of his employment he took a total of three in-house courses of approximately 40 to 60 hours. (Transcript, Volume 10, pp. 31-2) The courses involved product design, new systems coming out and new ways of troubleshooting the fire alarm panels with the new technology devices that were developed. The courses were taught by engineers from Edwards head

office (main manufacturing plant) in Owen Sound. (Transcript, Volume 10, pp. 32-3) The focus of the work he was then doing was on maintenance and repair. (Transcript, Volume 10, p. 34) After approximately three years with Edwards, Mr. Kennedy obtained experience in installation. He stated that as time went by he worked on more and more sophisticated systems. (Transcript, Volume 10, pp. 34-5)

Some of the buildings he worked on were the Toronto Dominion Centre, Queen's Park, Sheraton Hotel, Toronto, Holiday Inn, Toronto, Harbour Castle, Toronto and Pearson International Airport. (Transcript, Volume 10, p. 35) At that time he was responsible for performing the work along with a helper who assisted him. (Transcript, Volume 10, p. 36) By way of example he referred to the preventative maintenance function performed at the Toronto Dominion Centre as taking approximately eight months. (Transcript, Volume 10, p. 36) He noted that his inspections took him to all portions of a building including elevator shafts, basements, garages, "everywhere." In the course of performing inspections he became exposed to schematic diagrams, electrical wiring diagrams as well as other diagrams. (Transcript, Volume 10, p. 37)

As part of his responsibilities he had to review mechanical drawings (blueprints).

Mr. Kennedy also referred to situations where he was on an on-call response, where he would not have any documents with him. He

W) stated that he would then have to assess the situation starting from "scratch." (Transcript, Volume 10, p. 43)

Mr. Kennedy's experience included preventative maintenance and installation. (Volume 10, p. 44)

In the course of being involved in the installation side of Edwards' business, Mr. Kennedy became familiar with construction trades and how buildings were "put together." (Transcript, Volume 10, pp. 50-1) Working with electricians he learned the proper wiring connectors and connections and about voltage. From mechanical trades he learned how ducts are run and related matters. (Transcript, Volume 10, p. 51) Eventually, while working at Edwards, he functioned in the capacity of senior technician and new employees would work with him for a period of time before their first classroom sessions. (Ibid.) He became a trainer at Edwards after working there for about four years.

His work also involved troubleshooting. (Transcript, Volume 10, p. 52)

Although Edwards was not engaged in this line of work, Mr. Kennedy became involved in testing and performing inspections on sprinkler systems, fire extinguishers, hose cabinets and emergency lighting systems. This was because Edwards' sales persons sold a complete package to customers so that they wouldn't have to go to

different companies to get all their work done. Reference to a complete package was to a complete maintenance package. (Transcript, Volume 10, pp. 53-4)

He performed pre-planning relating to safety plans for different buildings so that people could get out of the building safely in the event of fire or other form of disaster. (Transcript, Volume 10, pp. 56-7)

He also had to have a sound knowledge of the Ontario Building Code, the Ontario Fire Code and the National Building Code. (Transcript, Volume 10, p. 57) He testified that while working at Edwards he would have to very frequently refer to the Ontario Fire Code. (Transcript, Volume 10, pp. 57-8) In referring to his knowledge of the Ontario and National Building Codes, he testified that he obtained his knowledge as a result of the courses that he had taken at Seneca College. (Transcript, Volume 10, pp. 58-9)

He took courses at Seneca College from around 1982 to around 1989 - which information is reflected at p. 3 of his résumé. He was involved in two diploma courses: Firefighting Emergency Service and Rescue and Fire Protection. (Transcript, Volume 10, p. 60) The Fire Protection Certificate program involved six courses and the total program took approximately 245 hours of instruction. (Transcript, Volume 10, p. 61) Among the courses taken by him were Introduction to Fire Protection. He received an A in this course

with a notation that he had passed with distinction. This was because he had taught a course in fire alarms for his instructor during one class. (Transcript, Volume 10, p. 63)

Another course taken by him at Seneca was Systems and Building Construction, Fire and Life Safety Planning involving, among other things, part 6 of the Ontario Fire Code. He also received instruction in parts 2, 7 and 8 of the Ontario Fire Code (Transcript, Volume 10, p. 65); Secure/Alarm Communication; Environmental Hazards.

Mr. Kennedy also took a course leading to a certificate in Emergency Rescue where he learned about occupational health and safety in the workplace and the WHMIS program (Transcript, Volume 10, pp. 68-9).

He also took a fire alarm design course at Seneca, although he could not remember whether he had completed it before he applied for the Fire Prevention Officer job. He also identified another course that he took: Special Extinguishing Systems, which dealt with advanced extinguishing systems, especially ones using foam. (Transcript, Volume 10, p. 70) This course was taken before he became a Fire Prevention Officer. (Transcript, Volume 10, p. 71)

As part of his work he had regular contact with contractors and trades persons. (Ibid.) He also dealt with members of the public. (Transcript, Volume 10, p. 72)

He also had interaction with members of the fire departments including, on one occasion, the Brampton Fire Department. (Transcript, Volume 10, p. 72)

He dealt with a number of fire inspectors in Toronto and Mississauga, who were frequently on the jobs where he worked performing inspections along side of him. (Transcript, Volume 10, p. 74) He had occasions to discuss with them the nature of the work that they were performing. He said he spoke to them "a lot." (Transcript, Volume 10, pp. 74-5) He said that he was then trying to get on the Fire Department. (Ibid.) In particular, he was interested in Fire Prevention. (Ibid.) He said that working with the Fire Prevention Officers gave him a useful insight into the work of Fire Prevention Officers. (Transcript, Volume 10, p. 77)

He noted that he taught the recruits in his Brampton Fire Department class about fire alarms. (Transcript, Volume 10, p. 78) The other fire prevention material was taught by Fire Prevention Officers. (Ibid.)

When he was a Third Class Firefighter he conducted a seminar on fire alarms for captains and district chiefs. (Transcript, Volume 10, p. 79)

Because he had had extensive training in the Fire Code, he found this very useful in performing mercantile inspections. In addition, his experience at Edwards with fire protection equipment and testing was of considerable assistance to him in carrying out mercantile inspections. (Transcript, Volume 10, p. 80)

He stated that he was a guest lecturer on a number of occasions at Seneca College. (Transcript, Volume 10, p. 83)

At Edwards he had experience in writing reports, which he described as "very extensive." The report writing involved responsibility in inspection validation through the completion of written forms detailing what he had found. (Transcript, Volume 10, p. 83)

He regarded himself as having acquired the ability to perform in-service inspections (mercantile inspections) prior to applying for the Fire Prevention Officer position through the mercantile inspections and the pre-planning inspections that he had performed.

He regarded himself as having demonstrated a knowledge of basic fire prevention practice and procedures at the time of the

competition, although he did not know the specific Brampton policies. He said that he had an overall knowledge of fire prevention in the city of Toronto, Mississauga, and Brampton, although he didn't know their individual policies. (Transcript, Volume 10, pp. 84-85)

He had at the time of the interview dealt with Fire Code enforcement and fire prevention education as part of his past work experience. (Transcript, Volume 10, p. 85) By the time of the interview he had had about seven or eight courses in fire prevention practices. (Transcript, Volume 10, p. 85) Before coming to the Brampton Fire Department he had had eight years' experience at Edwards as well as eight years at night school. (Transcript, Volume 10, pp. 85-6)

He regarded himself as having knowledge of basic construction methods and materials as a result of his involvement with the installation part of the fire alarm because he was required to go into a building at all stages of construction and because he had to work with the construction trades. (Transcript, Volume 10, p. 86) He identified the persons he worked with as persons in the electrical and mechanical trades as well as drywall instalers.

He also stated that he was able to read mechanical or architectural plans in the course of doing work with fire alarms. (Transcript, Volume 10, p. 87) He stated that the year that he

spent at Humber College was completely involved with architectural plans. (Transcript, Volume 10, pp. 87-8) He had taken a course on a program related to computers at Control Data in Don Mills but he did not complete it, and was frank in acknowledging that he had not had any hands-on experience of data processing and/or computer use except for a couple of courses that he took in the evening which "never amounted to anything." (Transcript, Volume 10, p. 88) He did state, however, that when he worked with fire prevention officers he had to be involved with very basic computer applications, such as looking up the name of a person who owned a building. He stated that there were no other computer functions performed by the Fire Prevention Officers generally in the Department while he was there.

As an expert in fire alarms, Mr. Kennedy has taught at the Fire College and has lectured throughout Ontario to fire departments at Orangeville, Etobicoke and Fort Erie. (Transcript, Volume 10, pp. 126-7)

Discussion and Decision

This very long case took 17 hearing days and produced a transcript containing over 2000 pages. It is a particularly sad case because it involves a very brave man, Mr. Wellington, who has suffered a great many medical and psychological set-backs that

would sorely test the strongest among us. Throughout, he has handled himself with courage and dignity. It can be easily seen how the incidents that led to the filing of his Complaint would be interpreted by him. He was a Firefighter who was completely devoted to the Brantford Fire Department and anxious to make firefighting his life's work. But for the intervention of his numerous health problems, I am certain that he would today remain as he was until the onset of his illnesses, a person proud and happy to be a Firefighter.

From his perspective, the culture of the Brantford Fire Department, as expressed in various provisions of the collective agreement, demonstrated a strong desire to be of assistance to those firefighters who through illness or injury were no longer able to continue in a firefighting capacity. In particular, he regarded the Fire Prevention Officer position in the Fire Prevention Division as a prime example of one where the Department had found a place that would accommodate the reduced physical abilities of members of the Department who in some way were disabled from continuing as firefighters because of illness or injury. His view of those persons who were given the position of Fire Prevention Officer because of some physical or emotional problem satisfied him that he should have been placed in that position.

His being denied the position in favour of a candidate with much less seniority, who had attained a lower rank as a Firefighter, coupled with what he perceived to be a perfunctory interview that seemed to focus on his physical condition, not unnaturally made him suspicious of the unbiased quality of the choice. These factors, along with a number of incidents which he regarded as demonstrating that the representatives of the Fire Department held a discriminatory attitude towards him because of handicap reinforced his conclusion.

It may be that this matter would not be before me if there had been better communication between the parties. Unfortunately, the representatives of the Employer did not appreciate the way in which Mr. Wellington more and more perceived them as being insensitive to his situation, to the point where they were viewed as discriminating against him because of the manifestations of his various physical problems.

As this case proceeded, I made a number of efforts to find a basis for resolving the Complaint through a settlement, which while it was not the one sought by any of the parties, would nevertheless, secure employment for Mr. Wellington. I was disappointed when my efforts proved fruitless.

I am here to deal with the issue of whether the Respondents discriminated against Mr. Wellington in carrying out the

competition for the Fire Prevention Officer position awarded to Mr. Kennedy, because of a handicap suffered by Mr. Wellington recognized by the Code. I am not here to adjudicate whether the Employer properly carried out its responsibilities under the collective agreement in deciding which applicant would be appointed to the Fire Prevention Officer position awarded to Mr. Kennedy. It might be that in carrying out the responsibilities under the collective agreement relating to the making of the choice of the successful candidate, the Respondents could have manifested an element of discrimination sufficient to warrant a finding that there had been a violation of the provisions of the Code as alleged in the Complaint.

On the facts before me I make the following findings:

1. The Brampton Fire Department through its representatives, such as Chiefs Core and Clark, had a history, both in the collective agreement and in what had become the general culture of the Department, of endeavouring to find a position in another Division for firefighters who as a result of a physical or emotional condition were no longer able to function as firefighters.

Whether this was required by the collective agreement or not, attempts were made to find a position that could be performed by a former Firefighter as long as there were no constraints to doing so under the collective agreement.

2. In the case of a contest between two candidates for a position, both of whom were members of the Department, where the skills and abilities of the candidates were relatively equal, the position would be awarded to that person who could no longer function as Firefighter because of illness or injury.

3. The Fire Prevention Officer position with which I am concerned evolved over time and the Department wished to institute certain changes to accommodate changes in legislation and in technology.

4. Whereas Fire Prevention Officers were, prior to the competition before me, generalists within the area of fire prevention, it was the intention of the Department to create a core of specialists who, in addition to doing the general work of the Division, would provide expertise in specific areas, such as alarms, sprinklers, construction and chemicals.

5. Deputy Chief Clark, as he then was, set-about to effect a change in the way Fire Prevention Officers were appointed. He considered this to be the propitious moment for him to do so because it was his first opportunity to move in this direction. His plans were understood and approved of by then Chief Core.

6. I find the Department to have acted in good faith in changing direction, and that its representatives had not introduced the changes as a pretext: that is, to undermine Mr. Wellington's

position because of his handicap. This can be seen from the pattern of appointments that followed that of Mr. Kennedy. The movement was clearly away from requiring firefighting experience and in favour of specialized fire prevention education and experience at a high technical level.

7. Although his beliefs were honestly held, Mr. Wellington was wrong in his conclusion that the most important thing in obtaining a Fire Prevention Officer position was being a former Firefighter no longer able to fulfil that role because of some physical or emotional handicap. The evidence satisfies me that there was at all times a requirement of a significant element of knowledge and experience in Fire Prevention, as demonstrated by the record of appointments of persons who had completed the Fire Protection course at the Fire College prior to appointment.

8. I am also satisfied that Mr. Wellington, although arriving at his conclusion honestly, did not appreciate the extent to which other experience figured in a decision to appoint a Fire Prevention Officer, which experience, through no fault of his own, he had not acquired. Mr. Wellington ceased being a Firefighter in October of 1986 and did not experience the additional training nor did he participate in such programs as the Hazmat program or the Industrial Inspection program which were factors considered in appointing a Fire Prevention Officer.

9. I can understand and sympathize with Mr. Wellington's conclusion that the rules of the game were changed without sufficient notification, and it is only natural that he would be suspicious of the good faith of the representatives of the Department in changing such requirements as being a First Class Firefighter to being a Third Class Firefighter and introducing the element of specialization into the selection process. Nevertheless, I am satisfied that the representatives of the Department had a genuine desire to move the Fire Prevention Division in the direction that they did and that it was not done, in any way, to discriminate against Mr. Wellington because of handicap. The evidence of the continued direction taken by the Department in its appointments is relevant in assessing its motivation in the case before me.

10. I do not wish to take anything away from Mr. Wellington when I say that to the time that he ceased functioning as a firefighter in 1986, he was a good one and that his supervisors found no fault with his performance. Given the other evidence before me, however, it is clear that the singular motivation of the Employer in preferring Mr. Kennedy to Mr. Wellington was the clear evidence of his expertise, not only in fire alarms and sprinkler systems but also in areas of construction, the following of different kinds of plans, as well as in a variety of areas of fire prevention where he had acquired expertise as a result of both formal and on-the-job training.

11. Again, and I do not wish to take anything away from Mr. Wellington. Given the nature of the competition, the requirements of the position and the relative skills and abilities of himself and Mr. Kennedy, there was no real contest. The facts were such that even if the representatives of the Employer had a discriminatory attitude towards a person with the medical background of Mr. Wellington, which I do not find to be the case, this was not an element in arriving at the decision to appoint Mr. Kennedy.

12. I am satisfied that that the members of the selection panel had already made up their minds about who the successful candidate would be, barring some unusual and unexpected information coming to their attention before the decision to appoint was made. The members of the panel were quite familiar with Mr. Wellington's background and experience, and the evidence makes it clear that the only reason why he was interviewed was because a situation might arise where Mr. Kennedy would not accept the position nor would Mr. Lale. In that circumstance, they would wish to consider Mr. Wellington for the position. To the extent that their interview with him was rather short, it merely accords with my view that he was never really a serious candidate and, to some extent, the panel was going through the motions. The evidence of Chief Core and then Deputy Chief Clark supports this conclusion. To Mr. Wellington, such action would, quite naturally, lead to other conclusions.

13. In all of the circumstances I would conclude, if there was no other evidence, that Mr. Wellington was not denied the position because of handicap and the existence of a handicap played no part in the decision to choose Mr. Kennedy.

14. A good deal of the over 2000 pages of transcript before me was taken up with evidence of matters occurring before, during and after the interview, which, it was suggested, disclosed an ongoing discriminatory attitude toward Mr. Wellington which ought to cause me to conclude that the decision to appoint Mr. Kennedy was in some respects as a result of the manifestation of discrimination against Mr. Wellington because of a handicap recognized under the Code.

15. The evidence supports the position of the Respondents that they were sensitive to the needs of firefighters suffering from a handicap and were not looking for loopholes to avoid living up to their obligations under the Human Rights Code. If Mr. Wellington was correct in his conclusion about the attitudes and behaviour of the Respondents, it would represent a dramatic departure from a history of looking after handicapped firefighters.

16. Once again, it is easy to see how Mr. Wellington interpreted the incidents relied upon by the Commission and himself as indicating a negative animus against him because of his numerous health problems. When viewed in isolation, the evidence of negative animus is equivocal. It was only during the course of the

hearing that there was an opportunity to explore, at very great length, a number of circumstances that were said to be manifestations of a discriminatory attitude and discriminatory behaviour. Both Chief Core and Chief Clark, although members of the old school of firefighting, recognized that fire departments are evolving institutions and must be responsive to changing times. Both have a very down-to-earth quality and some of their behaviour could be easily misinterpreted by Mr. Wellington. Unfortunately, although they were aware of Mr. Wellington's various medical problems, they did not fully appreciate the inner torment he was experiencing and were not as sensitive as they might have been to his perception of unfolding events.

17. I am satisfied from the evidence given by Chiefs Core and Clark that their equivocal expressions which convinced Mr. Wellington of their discriminatory attitude and behaviour, had plausible explanations. They were skilled in the area of the work of the Brampton Fire Department relating to fighting fires and fire prevention; they were definitely not skilled in the area of conducting competitions and they were frank in acknowledging their deficiencies in this area. They also experienced certain difficulties in communication which created a number of situations which were ambiguous and required explanation.

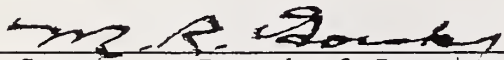
18. My review of the evidence satisfies me that the panel did not consider Mr. Wellington's medical history relating to handicap

recognized under the Code in arriving at its decision. He was regarded as being physically and emotionally able to carry out the responsibilities of a Fire Prevention Officer. His failure to be awarded the position was entirely based on the clear disparity between his qualifications and the objectively superior ones of Mr. Kennedy, and was untainted by any illegal act of discrimination based on handicap.

19. This is not a case where I have to consider a responsibility to accommodate Mr. Wellington in the Fire Prevention Officer job. The issue before me as presented by the Complaint and based on the theory of the Commission's case reasonably known to the Respondents, was that the Respondents had discriminated against Mr. Wellington in failing to appoint him to the Fire Prevention Officer job given to Mr. Kennedy, because of Mr. Wellington's handicap recognized under the Code. Although Mr. Wellington's perceptions were real and his having them quite understandable, the reality based on my review of the evidence is that he did not get the job simply because his qualifications were nowhere near as good as those of Mr. Kennedy. Furthermore, the equivocal evidence relied upon as supporting the conclusion was explained and I was left with the clear impression that Chiefs Clark and Core never intended to and did not manifest a discriminatory attitude based on handicap nor did they act in a discriminatory manner against Mr. Wellington because of handicap. Accordingly, the Complaint must be dismissed.

Notwithstanding my decision, I hope that the Employer will reconsider its offer, since withdrawn, to have Mr. Wellington work in the Communications Division. Taking into consideration everything that he has been through because of his various illnesses, his devotion to the Department, and the ongoing ethos of the Department to assist its handicapped members, I would urge that he be offered a position that he can perform within Communications or some other Division.

Dated at Toronto this 31st day of March, 1995.


M. R. Gorsky - Board of Inquiry